

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 13, 2006 Session

LYNNE MARIE NELSON MAYNOR v. GREG CHRIS NELSON

**Appeal from the Circuit Court for Davidson County
No. 97D-3037 Muriel Robinson, Judge**

No. M2005-02362-COA-R3-CV - Filed on November 27, 2006

Husband and Wife were divorced on March 11, 1998, at which time the court declared Wife primary residential parent of the parties' two minor daughters. Husband filed a petition to modify custody on June 24, 2004. At the close of Husband's proof, Wife moved to dismiss. The trial court granted the motion, finding that Husband's petition was devoid of merit since the children were influenced and coached in their testimony. Husband appealed. We affirm the decision of the trial court in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Helen Sfikas Rogers, Nashville, Tennessee, for the appellant, Greg Chris Nelson.

James R. Tomkins, Nashville, Tennessee, for the appellee, Lynne Marie Nelson Maynor.

OPINION

Mr. Greg Nelson and Mrs. Lynne Maynor were divorced on March 11, 1998. The marriage dissolution agreement provided the parties with joint custody of their two daughters, but indicated that Mrs. Maynor was primary residential parent. According to the decree of divorce, Mr. Nelson exercised visitation every other weekend from Friday afternoon until Monday morning. On the weeks when Mr. Nelson did not have weekend visitation, he kept the children on Thursday afternoon until Friday morning. The modified final decree additionally provided that if Mrs. Maynor traveled out of town for two weeks or longer, Mr. Nelson was allowed to keep the children and if less than two weeks, Mr. Nelson had the right to know with whom the children were staying and the right to call them. Mr. Nelson was ordered to pay \$600.00 per month in child support and half of the children's school and extracurricular fees.

On June 24, 2004, Mr. Nelson filed a petition to change custody. He claimed that Mrs. Maynor worked late and traveled frequently with her employment and therefore the children were left with their stepfather whom the children claimed was mean. Mr. Nelson also asserted that Mrs. Maynor interfered with his spring break visitation in 2004 and refused to give him additional time with the children. In addition to requesting a change in custody, Mr. Nelson sought modification of his child support obligation. Mrs. Maynor answered the petition on August 9, 2004, denying the material allegations therein and asserting that the children's desire to change residences was a result of the influence and coercion of Mr. Nelson.

The case was tried on August 16, 2005, and at the close of Mr. Nelson's proof, Mrs. Maynor moved to dismiss. The trial court granted the motion, finding that Mr. Nelson's petition had no merit since the children were coached in their testimony and were influenced by Mr. Nelson and his intense dislike for Mrs. Maynor's new husband. The court also found that Mr. Nelson was primarily responsible for causing the problems and animosity between the parties and that Mrs. Maynor should be awarded her attorney's fees. The trial court denied Mr. Nelson's motion to alter or amend the judgment and Mr. Nelson appealed.

I.

"Custody and visitation decisions are among the most important decisions that courts make." *Oliver v. Oliver*, M2002-02880-COA-R3-CV, 2004 WL 892536, at *2 (Tenn.Ct.App. Apr. 26, 2004). Although we recognize a preference for continuing existing custody arrangements, the legislature has empowered the court to alter custody arrangements when the circumstances of the children and their parents change. *Oliver*, 2004 WL 892536, at *2. The parent seeking to change an existing custody arrangement has the burden of showing that (1) the child's circumstances have materially changed in a way that could not have been reasonably foreseen at the time of the original decision; and (2) the child's best interests will be served by changing the existing custody arrangement. *Steen v. Steen*, 61 S.W.3d 324, 327 (Tenn.Ct.App. 2001). If the parent seeking a change of custody fails to demonstrate that the child's circumstances were altered in some material way, the trial court should not re-examine the comparative fitness of the parents or engage in a best interests of the child analysis. *Caudill v. Foley*, 21 S.W.3d 203, 213 (Tenn.Ct.App.1999). Instead, the court should simply decline to change custody. *Hoalcraft v. Smithson*, 19 S.W.3d 822, 830 (Tenn.Ct.App.1999).

Since custody and visitation decisions often hinge on subtle factors including the parties' demeanor and credibility during the proceeding, appellate courts are reluctant to second-guess the trial court's decision. *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn.Ct.App.1997). Furthermore, trial courts are granted broad discretion in these matters, therefore, "we decline to disturb custody decisions unless they are based on a material error of law or the evidence preponderates against them." *Adelsperger*, 970 S.W.2d at 485. We review these decisions *de novo* upon the record with a presumption of correctness afforded to the trial court's findings unless the evidence preponderates otherwise. *Nichols v. Nichols*, 792 S.W.2d 713, 716 (Tenn.1990).

II.

As a preliminary matter, Mr. Nelson claims that the trial court committed various errors during the trial. First, Mr. Nelson contends that the trial court erroneously required him to establish harm to the children in order to warrant an alteration to the existing custody arrangements. Although the court stated at the conclusion of the August 16, 2005, hearing that, “These children have not suffered under this parenting plan,” the court’s final order entered on August 29, 2005, clearly established that the reason the court dismissed Mr. Nelson’s claim was because Mr. Nelson had failed to show any change in circumstances. Mr. Nelson also argues that the trial court erred by determining that the antagonism between the parties precluded an equal residential parenting arrangement based on *Darvarmanesh v. Gharacholou*, No. M2004-00262-COA-R3-CV, 2005 WL 1684050, (Tenn.Ct.App. Jul. 19, 2005). However, the basis for the court’s decision was not the antagonism existing between the parties but rather, Mr. Nelson’s inability to show any change in circumstances. Lastly, Mr. Nelson asserts that the trial court erred by narrowing its factual review to the period after the last order was entered in the matter. The trial court must determine whether a material change in circumstance has occurred by considering if a change arose after the entry of the order sought to be modified. *Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn.2003). According to Mr. Nelson, the last order, which was entered in May 2003, did not address the residential arrangement but rather, resolved outstanding contempt issues and holiday visitation, therefore, the order sought to be modified was actually the final decree of divorce entered on March 11, 1998. However, when Mrs. Maynor’s counsel objected to the testimony pre-dating the May 2003 order, the court sustained the objection *provided* that the testimony addressed issues raised in the May 2003 order. Said the court:

MR. TOMKINS:	I’m going to object to relevance to anything that predates the last order that’s suppose - the last petition he filed.
THE COURT:	I sustain the objection. If it was addressed in that order, go from the order forward.

Therefore, we find no error in the trial court’s application of the law.

III.

With respect to establishing a material change in circumstances, Mr. Nelson first asserts that the children’s preference to live with him as a result of Mrs. Maynor’s remarriage constituted a material change in circumstances. “The remarriage of either parent does not of itself constitute a change in circumstances that would warrant a change of custody. However, the possible change in home environment caused by such remarriage is a factor to be considered in determining whether or not there has been a material change in circumstance that would warrant an alteration of custody arrangements.” *Tortorich v. Erickson*, 675 S.W.2d 190, 192 (Tenn.Ct.App.1984).

Although Mr. Nelson produced letters written by the children in which they stated that they wished to share equal residential time with their parents and the children testified that they did not like being around their stepfather because he was mean to them, the trial court found that there was no merit to Mr. Nelson’s petition. It was undisputed that the letters written by the children were done at the request of Mr. Nelson’s attorney. In addition, the trial court specifically found that the

children were coached in their testimony and that they were influenced by Mr. Nelson and his intense dislike for Mrs. Maynor's new husband. Said the court:

[The children have] been coached. And I'm going to make a finding here and you can go to the court of appeals.

...

These children are doing fine. What they've learned to do is, when they're with their daddy, they're all for their daddy. And when they're with their mother, they're all with their mother. Children have a great way of adjusting the scale balance here because what they're doing, they're trying to make one parent feel super when they're with them and trying to deal with their mother and make her feel special when they're with her.

They're good at doing this. And these children haven't suffered under this parenting plan. They're doing well. They're smart. They also appear from the testimony to be very influenced by their father and his intense dislike of their stepfather.

"Where the issue for decision depends on the determination of the credibility of witnesses, the trial court is the best judge of the credibility and its findings of credibility are entitled to great weight. This is true because the trial court alone has the opportunity to observe the appearance and the demeanor of the witnesses." *Royal Ins. Co. v. Alliance Ins. Co.*, 690 S.W.2d 541, 543 (Tenn.Ct.App.1985). Because the trial court specifically found that the children had been coached in their testimony and influenced by Mr. Nelson, we cannot find that the trial court erred in denying Mr. Nelson's petition based on Mrs. Maynor's remarriage.

Mr. Nelson next argues that Mrs. Maynor's travel schedule and her failure to comply with the marriage dissolution agreement constituted a material change in circumstances and therefore warrants a change in custody. However, the trial court found that the changes in circumstance of which Mr. Nelson complained were insufficient to support a modification of the parenting plan. After reviewing the record, we agree with the trial court's conclusion.

First, the testimony from the parties' daughters failed to show any material change in circumstance resulting from Mrs. Maynor's travel schedule. The parties' youngest daughter testified that although Mrs. Maynor travels for work, Mrs. Maynor spends a lot of time with her daughter. Additionally, the youngest daughter testified that the longest Mrs. Maynor is absent is four or five days in a month. The parties' oldest daughter testified that Mrs. Maynor travels "every now and then." The oldest daughter could not recollect how often Mrs. Maynor traveled but stated that it was often but not every week.

Next, Mr. Nelson testified that Mrs. Maynor violated the marriage dissolution agreement by failing to inform him of whom the children were staying with when she traveled out of town and by taking the children to Florida during Mr. Nelson's spring break visitation in 2004. We agree with the trial court that these allegations, even if true, are also insufficient to warrant an alteration in the

existing custody arrangement. There was no evidence that Mrs. Maynor purposely and deliberately failed to communicate with Mr. Nelson about her travel schedule in order to erode the relationship between Mr. Nelson and the parties' daughters. In fact, the trial court found that Mr. Nelson was primarily responsible for causing the problems and animosity between the parties. Said the court:

First of all, I conclude from the testimony and demeanor of the witnesses that your client, Mr. Nelson, is a major problem in this problem.

...

I think Mr. Nelson needs to reassess and take a course in getting along with people because he manufactures most of the problems in this case. This is the second time he's applied for a change of custody where the petition has absolutely no merit. He is still mad at Ms. Maynor. He stirs things up.

Mrs. Maynor testified that she mistakenly took the children to Florida in 2004 because she believed that it was her turn to have the children during spring break visitation. The parties subsequently entered an agreed order allowing Mr. Nelson visitation during the next two consecutive spring breaks.

Mr. Nelson also contends that Ms. Maynor's refusal to allow him extra residential visitation in addition to that provided in the marriage dissolution agreement warrants an alteration of the custody arrangement. However unfair Mr. Nelson may perceive Mrs. Maynor's conduct to be, she is under no legal obligation to consent to Mr. Nelson's requests for additional time with the children. We would note, however, that the legislature has recognized "the fundamental importance of the parent-child relationship to the welfare of the child, and the relationship between the child and each parent should be fostered unless inconsistent with the child's best interest." *Costley v. Benjamin*, No. M2004-00375-COA-R3-CV, 2005 WL 1950114, at *18 (Tenn.Ct.App. Aug. 12, 2005). "Most children do best when they receive the emotional and financial support of both parents" and the courts should make residential provisions for a child that "encourage each parent to maintain a loving, stable, and nurturing relationship with the child." *Costley*, 2005 WL 1950114, at *18.

Finally, Mr. Nelson argues that the advanced age of the children is a material change in circumstance. Changes related to age is one factor which may be considered when determining the propriety of a modification of visitation. *Demonbreun v. Demonbreun*, No. M2004-02105-COA-R3-CV, 2005 WL 3555545, at *10 (Tenn.Ct.App. Dec. 28, 2005). However, the change in age in this case is insufficient to overcome the preference for continuing existing custody arrangements despite the fact that the parties were divorced when the children were much younger. It was uncontradicted that both daughters are good students with no educational difficulties or disciplinary problems of any kind. The children's teacher, Ms. Betty Dozier, testified that the girls are smart, hardworking, well behaved, and polite and that the girls have been raised well. Therefore, we find no error in the decision of the trial court. Because we agree with the trial court that there has been no material change in circumstance, we need not address the best interests of the children. *See Caudill*, 21 S.W.3d at 213; *Hoalcraft*, 19 S.W.3d at 830.

As a final matter, Mr. Nelson claims that the trial court erred in awarding Mrs. Maynor her attorney's fees. A trial court has the authority to award a parent his or her attorney's fees incurred in the defense of a petition to modify custody provisions of a final decree of divorce. Tenn.Code Ann. § 36-5-103(c). The award of attorney's fees are well within the discretion of the trial court, *Kesterson v. Varner*, 172 S.W.3d 556, 573 (Tenn.Ct.App.2005), and therefore will be upheld on appeal unless the trial court abused its discretion. *Eldridge v. Eldridge*, 137 S.W.3d 1, 25 (Tenn.Ct.App.2002).

Mr. Nelson contends that because he prevailed on an issue raised in his motion to alter or amend the judgment concerning the method of payment of the children's tuition, he was a prevailing party in the litigation and therefore should not be liable for all of Mrs. Maynor's attorney's fees. The purpose of fee awards in child custody and support cases is to protect the child's, not the parent's interests and remedies. *Sherrod v. Wix*, 849 S.W.2d 780, 784 (Tenn.Ct.App.1992). Therefore, "requiring parents who precipitate custody or support proceedings to underwrite the costs if their claims are ultimately found to be unwarranted is appropriate as a matter of policy." *Sherrod*, 849 S.W.2d at 785. The trial court specifically found that Mr. Nelson's petition had "absolutely no merit" thus we find no error in the trial court's decision to award Mrs. Maynor the entirety of her attorney's fees for defending this merit-less suit. Alternatively, Mr. Nelson argues that the amount of attorney's fees awarded to Mrs. Maynor was unreasonable. After reviewing the affidavit and time itemization schedule submitted to the court by Mrs. Maynor's counsel, we cannot find that the trial court abused its discretion in the fee award.

Mrs. Maynor applies for attorney's fees on appeal. She has successfully resisted all efforts by Mr. Nelson to change the parenting arrangements in this case. We find that she is entitled to attorney's fees on appeal under Tennessee Code Annotated section 36-5-103(c). *Toms v. Toms*, 98 S.W.3d 140 (Tenn.2003); *D. v. K*, 917 S.W.2d 682 (Tenn.Ct.App.1995).

The judgment of the trial court is affirmed in all respects, and the case is remanded to the trial court for setting of attorney's fees recoverable by Mrs. Maynor on appeal and for such other proceedings as may be necessary or proper. Costs of the cause are assessed to Appellant.

WILLIAM B. CAIN, JUDGE